

Washington University Law Review

Volume 97
Issue 6 *The Religion Clauses*

2020

Keynote Address: Freedom of Association: Campus Religious Groups

Michael W. McConnell

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [First Amendment Commons](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Michael W. McConnell, *Keynote Address: Freedom of Association: Campus Religious Groups*, 97 WASH. U. L. REV. 1641 (2020).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol97/iss6/9

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

KEYNOTE ADDRESS

FREEDOM OF ASSOCIATION: CAMPUS RELIGIOUS GROUPS

MICHAEL W. MCCONNELL

On August 15, 1789, the First Congress met to discuss the proposed Bill of Rights. On the agenda for the day was a draft of what we now call the First Amendment, but which was their Third Amendment. It was proposed by a Select Committee, based in significant part on an earlier proposal written by James Madison. One of its two clauses provided for four separate and distinct expressive freedoms—apart from religious freedom, which was originally located in a separate clause. The four expressive freedoms were speech, press, the right of the people to assemble and consult for their common good, and petition.¹ Each of these freedoms had its own history, content, and rationale.

Theodore Sedgwick, a Federalist representative from Massachusetts and a first-rate lawyer, was the first to speak. He objected that the protection for freedom of speech made it redundant to spell out the rest of these rights, and particularly the right to assemble:

[W]hat, said he, shall we secure the freedom of speech, and think it necessary, at the same time, to allow the right of assembling? If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question

It was inappropriate, he argued, for the House to spell out the details once a basic right has been secured. “[I]t is derogatory to the dignity of the House to descend to such minutiae”; “he feared it would tend to make them appear trifling in the eyes of their constituents”

John Page, a Jeffersonian Republican from Virginia, disagreed with Sedgwick. Freedom of assembly was not a thing that never would be called in question. On the contrary, he reminded Sedgwick that “such rights have been opposed,” that “people have also been prevented from assembling together on their lawful occasions.” Page is referring to William Penn, who was prosecuted for unlawful assembly for preaching to a Quaker crowd on

1. 1 ANNALS OF CONG. 759–61 (1789) (Joseph Gales ed., 1834). The debate is reprinted in many places, among them MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 832–34 (3d ed. 2017). All quotations from the debate are from the same source and will not be separately footnoted.

Gracechurch Street in London. (The location of Penn's speech is significant; it was on a public street.) Everyone in the room at that time would have known the story of Penn's prosecution, though it is little remembered today. "[T]herefore," Page argued, "it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."

Pay attention to Page's worry about "pretext," meaning an assertion of government authority not directly involved with speech. He does not tell us exactly what he is concerned about, but the context of the Penn prosecution provides an example. Penn could be prosecuted because he delivered his sermon on a public street, which is public property. If there is a constitutionally guaranteed freedom to assemble, there must be a place in which to do so. Some assemblies took place on private property, principally churches, taverns, and coffee houses. But those locations were typically limited in capacity and not always available. Most large public expressive gatherings were on public property, such as the Boston Commons, where the original Tea Party folks gathered to organize and hear speeches, or the public street where William Penn so famously was arrested. It took the Supreme Court many years to recognize that public streets, parks, and sidewalks must be open for people to assemble and speak,² but the logic of the public forum doctrine was contained in Page's reminder of Penn's act of sermonizing on Gracechurch Street in London.

In sum, Sedgwick regarded it as obvious that the freedom of speech encompassed the right of people to freely converse together, and thus to get together in groups for that purpose, making it unnecessary to list the freedom separately. But Page was correct that governmental authorities regarded assembly as a particularly dangerous activity and regulated it more strictly than more private forms of speech. It might seem obvious that people have the right to meet together in groups, to "freely converse together," as Sedgwick put it, but the distinctive character of the assembly right argues for including a separate and independent protection in the First Amendment. John Page won the argument. Sedgwick's motion "lost by a considerable majority," according to the report in the *Annals of Congress*.³

For the right to *speak* focuses on the message. That is why content and viewpoint-based regulations are subject to the strictest possible judicial scrutiny. The right of assembly or association focuses on something *antecedent* to the delivery of a message: on the process of formulation of ideas and selection of a message. A group of like-minded people—

2. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

3. 1 ANNALS OF CONG. 761.

Presbyterians, say, or Democrats or veterans or the American Bar Association—may not even know what their message on a particular issue will be until they have had the chance to meet. And this right of association involves a collective or communitarian element not necessarily present for mere speech. We may be able to speak spontaneously and as individuals, but we cannot communicate as a group unless we can gather as a group to share our ideas and aspirations. A group of our own choosing. The American Revolution might never have gotten off the ground if the Sons of Liberty had been required to allow the local Tories to participate in their deliberations.⁴

It is one thing to allow individuals to say whatever they wish, and quite another to allow them to cooperate with others to decide what they wish to say as a group. Collective speech is potentially much more powerful than individual speech. It is also potentially much more dangerous or subversive to the government—which is why this right is qualified by the adverb “peaceably,” which was not thought necessary for speech, press, or petition. And thanks to John Page and others, this right of assembly and association is equally and independently protected by the First Amendment. If we prevent the government from regulating the content of what we say, but allow it to regulate and control the membership, leadership, or institutional structure of the groups that are the seedbed of ideas and communication, we will have given the government a powerful instrument for controlling speech, press, religion, assembly, and petition. To focus just on preventing content-based regulation of messages is not enough.

Despite Sedgwick’s optimism, the right of groups to assemble and converse together would not remain uncontroversial for long. When, perhaps inspired by the Jacobin Clubs of Paris, opponents of the Washington-Hamilton administration organized so-called “Democratic-Republican Societies” up and down the seaboard,⁵ many Federalists thought this was taking the freedom of association to dangerous extremes. Not only did the whole enterprise bear too strong a resemblance to things French—never popular in America—but the Societies’ practice of holding meetings only among like-minded members struck many critics as a mark of conspiracy. When the so-called “Whiskey Rebellion” broke out in Western Pennsylvania, even the usually tolerant President George Washington was quick to connect the dots between the Societies and the Rebellion.

4. I borrow the insight that modern freedom of association derives from freedom of assembly from Professor John Inazu. See JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 20–25 (2012).

5. For the historical background, see Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525 (2004).

Ironically, Sedgwick himself was among those who sought to use the power of Congress to condemn the clubs. But Madison and others fought for their right to freedom of assembly—what we would now call freedom of association—and fortunately, he mostly prevailed.⁶ Madison later called Washington's attack on the Societies the worst mistake of his career.

By the early nineteenth century, the propensity of Americans to form groups and associations of every possible shape and description—social groups, political groups in and out of power, religious societies, charitable groups, farm cooperatives, workers' associations, you name it—had come to be the defining element in our national character. It was the first thing young Alexis de Tocqueville noticed when he and his friend Gustave de Beaumont set foot in Jacksonian America. Tocqueville, probably the most profound observer of the American spirit of liberty ever to put pen to paper, wrote that “[t]he most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty.” He commented that “[i]n our own day freedom of association has become a necessary guarantee against the tyranny of the majority.”⁷

And by freedom of association Tocqueville and the early nineteenth century Americans did not just mean the ability of random crowds to meet on the public square, but of selective groups and associations to organize around shared beliefs. As Tocqueville explained: “An association simply consists in the public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make these doctrines prevail.” Abolitionists met in abolitionist conventions, Methodists prayed together in Methodist camp meetings, Whigs marched with other Whigs (and not a few barrels of hard cider) in campaign rallies, and the Masons did whatever they do in their mysterious lodges with fanciful names and exotic costumes. Diversity of opinion spread through diversity of groups.

Just as the freedom of speech necessarily includes the freedom not to be compelled to affirm beliefs you do not share, the freedom of association necessarily includes the freedom to limit your association to persons who share your values and beliefs. Were it not so, outsiders and even adversaries to your perspective could have the power to alter or distort your message.

Canadians often claim that their vision of pluralism is based on the mosaic rather than the melting pot. Whether that is an accurate reading of

6. See 4 ANNALS OF CONG. 947–48 (1794) (adopting a watered-down version of the resolution, no longer mentioning the Democratic-Republican Societies by name).

7. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835). All quotes from this source may be found in pages 190–93.

the difference between the two nations I am skeptical, but I do think the Canadians are right to emphasize the mosaic. Freedom of association is based on the mosaic. Each individual society is no more diverse and representative than the Democratic-Republican Societies or the Masons. Diversity and pluralism come from the peaceful coexistence of multitudes of associations.

Supreme Court doctrine used to reflect this understanding. In an opinion a few decades ago, the Court stated that “the freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”⁸ This was not a conservative principle and not a liberal principle, but a constitutional principle shared across the usual ideological divide. Justice William J. Brennan put it this way:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁹

Justice Sandra Day O’Connor agreed, in these words: “Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”¹⁰

Applying these principles, the Supreme Court protected the right of the NAACP not to reveal the names of its members, the right of political parties to exclude voters aligned with the other party from the process of choosing presidential nominees and to set their own qualifications for party officers, the right of religious organizations to hire members only of their faith to run their organizations, and—most recently and controversially—the right of the Boy Scouts of America to exclude a person “who openly declares himself to be a homosexual” from serving as a scoutmaster and role model.¹¹

Moreover, the Court made clear that a wide range of governmental actions—not just straightforward legal prohibitions—“may unconstitutionally infringe upon this freedom.”¹² In two of the cases, the

8. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

9. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

10. *Id.* at 633 (O’Connor, J., concurring in part and concurring in the judgment).

11. *La Follette*, 450 U.S. 107; *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000).

12. *Roberts*, 468 U.S. at 622.

Court held that a group's exercise of the freedom of association could not be used as the basis for excluding the group from a forum for speech. One of these, *Healy v. James*, involved a public university's refusal to allow a '60s radical student organization, the Students for a Democratic Society (SDS), to be a recognized student organization with a right to meet on campus and use the ordinary channels of communication.¹³ The second, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, involved a city's denial of a permit to use public streets for a parade, on account of the group's exclusion of a gay and lesbian contingent that wanted to march in the parade. The Court held, unanimously, that the parade organizers could not be denied a permit to use public property merely on account of their exercise of the freedom of association.¹⁴

Even in its heyday, this right was not absolute. The government had the authority to enforce race and sex discrimination laws in the commercial sphere, against employers, businesses, and commercial associations like the traditional men's eating clubs that used to be a barrier to women's participation in commerce. In the most famous of these cases, *Roberts v. United States Jaycees*, the Court allowed the state of Minnesota to enforce a nondiscrimination law against the United States Jaycees, a private business networking organization previously open only to young men.¹⁵

And the government could enforce antidiscrimination rules even against noncommercial expressive associations if restrictions on membership were logically unrelated to the group's message or beliefs. Again, the Jaycees were the prime example. Their exclusion of women from voting membership had no logical connection to any positions the Jaycees took in the public arena. Justice Brennan put it this way:

There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to . . . disseminate its preferred views. The Act . . . imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.¹⁶

That was the ground for disagreement among the Justices in the *Boy Scouts* case, too. Four of the Justices believed that homosexuality was not relevant to the Boy Scout's message about being morally straight, but none of the Justices disputed that the Scouts, like other associations, have the right to

13. *Healy v. James*, 408 U.S. 169 (1972).

14. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

15. *Roberts*, 468 U.S. 609.

16. *Id.* at 627.

enforce membership or leadership restrictions that do, in fact, have a bearing on their organizational message and beliefs.

This is how Supreme Court doctrine stood in 2010, when the Court granted certiorari in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, in which I had the honor of representing the Petitioner.¹⁷

- Private, noncommercial expressive associations have the clear constitutional right to confine those who vote on and control their message to persons who share their beliefs, even if those beliefs are contrary to governmental policy.
- Groups may not be excluded from speech forums, including public university student activity recognition, on account of the exercise of their associational freedom.

That should have made *Christian Legal Society* an easy case.

The facts of the case are probably familiar. Hastings College of the Law is a public law school located in the heart of San Francisco, California. Like most, maybe all, public universities, Hastings allowed students to form groups to reflect their interests and commitments and gave those groups access to meeting space on campus, communications channels, and money for public events. The stipulated purpose of this campus forum program was “to promote a diversity of viewpoints *among* registered student organizations.”¹⁸ *Among*, not within. *Mosaics*, not melting pots. There were over sixty such groups, from frisbee teams to wine tasting, both a Democratic club and a Republican club, a pro-life and a pro-choice club, clubs based on race or ethnic identity, and at least three religious clubs. Only one group ever was excluded: the Christian Legal Society (CLS) student chapter. CLS was a tiny group, having maybe five or six members. Its principal activities were weekly Bible studies, speakers, dinners, and organizing transport to worship services. All its activities were open to all students, but its leadership and voting membership were limited to Christians, as defined by the organization’s Statement of Beliefs. The law school administration recognized the group for about a decade, until the group adopted a statement that sexual intimacy should be reserved for marriage, defined as a marriage between one man and one woman. Only students subscribing to this statement of beliefs could vote on the group’s

17. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez* (*Christian Legal Society*), 561 U.S. 661 (2010).

18. *Id.* at 730 (Alito, J., dissenting) (quoting Appendix at 261, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371)).

policies and program, or speak in its name, as by leading the weekly Bible studies.

The Hastings law school administration concluded that this requirement ran afoul of Hastings's Nondiscrimination Policy. To be sure, the precise content of that policy was the subject of great confusion in the litigation. As written, the policy barred only the standard categories of discrimination. The only one of these that related to the organization's *beliefs* was the prohibition on discrimination based on religion. All the other protected categories had to do with immutable characteristics like race, sex, disability, and sexual orientation. In its answer and interrogatory responses, Hastings stated that its Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs."¹⁹ CLS thus argued that Hastings's policy discriminated on its face against religious groups, because political, social, cultural, and other viewpoint-based student groups were permitted to reserve membership and leadership positions to members who shared their beliefs. Only religious groups were denied this right, because "religion" was the only viewpoint-related characteristic in Hastings's list of prohibited bases for discrimination.

In the midst of discovery, however, Hastings declared for the first time that it actually had an unwritten policy that all student groups were required to accept all students and even let them vote and participate in leadership—even if they did not share and even if they openly opposed the purposes and beliefs of the group.²⁰ This it called the "all-comers policy," meaning that all student groups had to be open to any student who wished to join.²¹ This policy avoided the explicit viewpoint discrimination problem of the written nondiscrimination policy, at the price of denying to every student group at Hastings the freedom of association right to limit themselves to members who share their beliefs. Joint Stipulations entered by both parties to the litigation attested to the existence of both the written nondiscrimination policy and the all-comers policy.²² The all-comers policy was never enforced against any group other than the Christian Legal Society chapter.²³

If actually enforced, the all-comers policy would mean that groups of all sorts would lose control over their identity. A Republican club would have to admit Democrats. An NAACP chapter would have to allow racist

19. Joint Appendix at 93, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371).

20. The facts are described in detail in Justice Alito's dissent. *Christian Legal Society*, 561 U.S. at 707–16 (Alito, J., dissenting).

21. Kane Deposition at 49, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371); Chapman Deposition at 29–31, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371).

22. See Joint Stipulations at 14–15, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371) (written Nondiscrimination Policy); *id.* at 18 (all-comers policy).

23. See *Christian Legal Society*, 561 U.S. at 711–12 (Alito, J., dissenting).

skinheads to sit in on its planning meetings. The environmentalist club would have to allow a global warming skeptic equal time at the microphone at a climate change rally. A member of Jews for Jesus, or an out and out anti-Semite, could demand an equal shot at leading the Jewish Law Students' Torah study. Of course, smaller and less powerful groups are more likely to be harmed, because it is easier for them to be overwhelmed by attendees who are their ideological antagonists. But just as the written policy was blatantly viewpoint discriminatory as applied to religious groups, the all-comers policy violated the core principle of freedom of association of every group. As stated by Justice Brennan:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.²⁴

The Supreme Court upheld Hastings's all-comers policy on its face, by a 5-4 vote. The Court did not address the constitutionality of the written policy and did not address the specific facts of the case about discriminatory enforcement. As discussed at length in Justice Alito's dissenting opinion, it is highly questionable whether the all-comers policy even existed apart from the litigation, and in light of Hastings's failure to apply it to other organizations. But those problems are peculiar to one case only. It is the Court's constitutional analysis that matters for the future. Accordingly, let us take the all-comers policy at face value and see how the Court managed to square it with principles of freedom of association. I submit that the Court's reasoning should be worrisome to civil libertarians across the board, even those who may not think well of religious organizations. Hastings's target was a Christian group whose views on sexual morality are anathema to the institution, but the doctrine announced by the Court could be used against any group whose beliefs are out of favor with the authorities.

The Court's reasoning involved two important doctrinal moves. First, the Court subsumed the freedom of association claim into the free speech claim. Freedom of association was the lynchpin of CLS's argument against the all-comers policy. But the Court held that the all-comers policy satisfied its test under the Free Speech Clause, on account of applying equally to all viewpoints.²⁵ It then declined to treat the association claim independently, stating that it would be "anomalous" to protect freedom of association when

24. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

25. *Christian Legal Society*, 561 U.S. at 694-95.

a free speech claim arising in the same context fails.²⁶ Holding that CLS's "expressive-association and free-speech arguments merge," the Court declined to apply its expressive association precedents.²⁷

Now I went to law school. I must have missed the class where they said you cannot bring two different constitutional claims arising from the same set of facts. I am genuinely baffled where the Court came up with this idea. But it is insidious, because freedom of speech and freedom of association do not protect exactly the same thing. They are closely intertwined, as the Court says, but they protect different aspects of expressive freedom. Under the Court's *speech* cases, the central question is whether the government is neutral toward the particular *message* or viewpoint being expressed. Under the Court's *association* cases, the central question is whether the regulation undermines the group's ability to control its identity.

These two rights are different. They have different elements. To "merge" the freedom of association right into the free speech claim and then say the group loses on freedom of association because it could not carry a free speech claim, means that freedom of association is written out of the Constitution. No one asked, in the *Jaycees* case, the *Boy Scouts* case, the *Hurley* parade case, or the political party cases, whether the challenged state laws discriminated against any particular viewpoint. It was enough if they were shown to force a group to admit people who did not share the group's beliefs or ideology.

Speech claims under the First Amendment focus on what the speaker said. That is why free speech doctrine applies strict scrutiny to regulation based on content and viewpoint, applying lesser scrutiny to content-neutral regulation of time, place, and manner. Associational rights have to do with the composition of the group. Under freedom of association precedents, all groups have the right to choose their leaders and their members even if the restriction is entirely viewpoint neutral, unless the group is attempting to exclude on a basis that is irrelevant to its message—an exception obviously inapplicable to the Christian Legal Society. Freedom of association is not about viewpoint neutrality; it is about every group's right to be able to maintain control over its message by choosing its leaders and voting members.

In effect, the Court did what Theodore Sedgwick urged and John Page opposed: it collapsed the First Amendment protection for freedom of association into the protection for speech.

The Court's second doctrinal move was even more damaging. It held that the freedom of association is protected only against outright government

26. *Id.* at 681.

27. *Id.* at 680.

compulsion and not against the denial of benefits. The Court explained that Hastings “is dangling the carrot of subsidy, not wielding the stick of prohibition.”²⁸ And the Court said that freedom of association protects against regulations that “*compel*”—that word is in italics in the opinion—a group to include unwanted members, but not regulations that penalize the group by denying it an otherwise generally available benefit.²⁹ In doctrinal terms, the Court held that the unconstitutional conditions doctrine does not apply to freedom of association.

There are two problems with that conclusion. The first is precedent. In the *Jaycees* case, Justice Brennan wrote for the Court: “Government actions that may unconstitutionally infringe upon this freedom [the freedom of expressive association] can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group”³⁰ For this proposition, he cited one of the public university speech forum cases, making it clear that denial of access to a campus forum can be a violation of the freedom of association right.³¹

Precedent is thus plainly contrary to the Court’s conclusion, but so is logic. There is no reason why freedom of association would be any different from our other rights with respect to the right-privilege distinction. They all have the same structure. Americans have certain freedoms and the government may not impinge upon those freedoms by denying those who exercise them otherwise generally available benefits. As Justice Brennan explained in *Speiser v. Randall*, to deny an otherwise available right on account of exercise of a constitutional freedom is the equivalent of a “fine” for exercising that right.³² The Court used the unconstitutional conditions logic with respect to certain property-related rights in the 1920s. It extended the logic to freedom of speech in the 1950s, and to free exercise of religion in 1963. Most recently, the Court applied the logic to federalism, in *National Federation of Independent Business v. Sebelius*.³³ I know of no constitutional right to which unconstitutional conditions doctrine has not been applied, other than freedom of association in the *CLS* case.

28. *Id.* at 683.

29. *Id.* at 682.

30. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

31. *Id.* (citing *Healy v. James*, 408 U.S. 169, 180–184 (1972)).

32. 357 U.S. 513, 518 (1958).

33. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583 (1926); *Speiser*, 357 U.S. 513; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579–85 (2012); see generally Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

The Court gave no reason for confining the protection of freedom of association to the “stick of prohibition.”³⁴ This seems to be a throwback to the days when Oliver Wendell Holmes could say that a policeman fired for criticizing an elected official “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”³⁵ The author of the *CLS* opinion has in recent years joined opinions holding that denial of the “carrot of subsidy”³⁶ can violate other First Amendment freedoms.³⁷ It thus remains to be seen whether the departure in the *CLS* case signals a general retreat from the unconstitutional conditions doctrine across a range of cases, or just in freedom of association cases, or—quite possibly—just in this case alone.

The framers of the Bill of Rights said little about what they meant by the First Amendment, but one thing we know: they regarded the four expressive freedoms of speech, press, petition, and assembly (or association) as distinct and worthy of separate mention. Unlike the modern Court, they saw the dangers in merging all such claims into the protection for speech. The *Christian Legal Society* case demonstrates the consequence of doing just that.

34. See *Christian Legal Society*, 561 U.S. at 683.

35. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

36. *Christian Legal Society*, 561 U.S. at 683.

37. See, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013).